

LABOR ADVISORY BOARD MEETING

Meeting Minutes

April 13, 2010

1:00 p.m.

LAB Member Attendance:

James P. Bruner, Dennis Gannon, Mark Guethle and John Penn

IDOL Staff Attendance:

Catherine Shannon, Bert Rodriguez, Michael Haggerty, John Bastert, Suzanne Davis, Doris Moy, Sara Scherer, Tom Whalen and Carmela Gonzalez

Call to Order:

Meeting called to order at 1 pm by Director Catherine Shannon.

Director Update:

Introduction of New LAB Member:

Director Shannon introduced Mr. Thomas J. Wronski as a new member who will serve as a management representative on the Board. Wronski owns a national executive search consulting firm located in the DuPage area. After the introduction, Mr. Wronski spoke for a few minutes about his interest in assisting the Department and learning all he can in regards to the Department.

Update on Current Status of LAB Members:

Director Shannon stated that the Board currently had seven Board members, including Mr. Wronski. There are six vacancies that need to be filled and all members are serving with expired terms. Director Shannon also stated that Carmela Gonzalez and herself would be meeting with the Governor's Office that afternoon in regards to appointments and status of current members. An update would be provided at the next quarterly Board meeting on the status of new members to the Board and possible reappointments.

Assistant Director Update:

Budget Update:

Assistant Director Rodriguez provided an update on the Department's budget. At the previous board meeting (in January) there potentially would be a 14% cut to the budget that would result in a 12 to 15 staff layoff. To date, that matter has been resolved and no layoffs will happen for FY 11 due to the prohibition of state agencies, including ours, to not layoff AFSCME bargaining unit employees. Currently, the Department has the funding to keep all 86 employees for FY 11.

Director Shannon also stated that while there can be no layoffs of bargaining unit employees, staff vacancies and retirements will not be filled due to the budget crisis and not having the resources to hire any additional staff.

LAB Member Mark Guethle stated that when he visited Florida he encountered "citizen volunteers" for the police and fire department. These volunteers do not get paid but help enforce the laws in their towns. He asked if that could be an option for the Department in order to provide some type of assistance and relief. Director Shannon stated it was an interesting proposition and that the Department would look into it to see if it could be done. However, several questions needed to be answered. For example, would it create a conflict with bargaining unit employees and also would the Department be violating its own labor laws if these individuals did not get paid?

Assistant Director Rodriguez stated that in reviewing a report in regards to wage theft one of the recommendations was to coordinate and partner up with outside entities and community organizations to assist in advising workers on what their options were in situations where workplace abuse occurred. Currently, the Department does that primarily with laws that the Fair Labor Standards Division and to some extent the

Conciliation and Mediation Division enforce. The solution might be in expanding that type of collaboration. But in order to do that, additional resources are needed at the Department and the issues cannot be resolved with Department input only. There needs to be changes across the board ranging from possible changes in legislature that include the option of a private right of action; as well as attorney involvement with community organizations and state government.

Wage Theft Update:

Wage Theft is an issue that the Department combats with on a daily basis and it encompasses several of the laws the Department enforces. There have been several efforts, both from a legislative and from a community organization side, to address the issue of workers not getting paid wages they are due. Legislative Liaison Sara Scherer will be giving an update on the pending legislation in regards to proposed amendments for the Wage Payment and Collection Act. However, in order for this legislation to be introduced the Department met with several community groups over the past few months to discuss thoughts on what amendments would be beneficial to propose in order to help better fight the issue of wage theft.

To that end, the University of Illinois at Chicago (UIC) Center for Urban and Economic Development released a study called: “Unregulated Work in Chicago”. This report tries to quantify what the issue of wage theft is and how it impacts Chicago specifically. The Department is still trying to figure out how UIC came up with their numbers. One of the areas that is confounding about the study is the assertion that in Chicago alone \$7 million is lost on wages on a weekly basis due to wage theft – whether that means their last paycheck, not being paid the minimum wage, working off the clock or other illegal deductions is not clear. In the Department’s opinion, that seems like a huge number and just for the Board to get a sense of how huge the number is: In 2009, the Department collected for both wage claims and minimum wage over 3.1 million dollars for the entire year. If UIC’s numbers are accurate, that would mean the Department is just scratching the surface in the area of wage theft. However, the Department certainly recognizes that this issue needs to be addressed and we’re hopeful that if the proposed amendments to the Wage Payment and Collection Act become law, the Department will help workers receive the wages they are owed.

Director Shannon also indicated that the study covers a lot of people that the Department has no jurisdiction over; such as individuals who watch children in their home. And while the study states that in Chicago alone 7 million dollars is lost in wages, it does not necessarily mean that if they file a claim with the Department we would be able to provide them with any assistance. Assistant Director Rodriguez also added that it not only is a state issue but it can also be a federal issue. A few weeks ago, the US Department of Labor held a press conference in Chicago where they announced the major efforts they’re putting into the same issue. Nationwide they have hired 20 inspectors. In contrast, our Department has only 4 staff to investigate these types of claims statewide and on average we received about 8000 claims annually.

A link to the study will be sent to all members for their review.

Division Reports and Board Discussion:

Legislative Division:

Legislative Liaison, Sara Scherer reported on the following:

SB 3568 – Wage Payment and Collection Act

- Increases civil and criminal penalties for violators of the Act.
- Corrects some of the challenges the Department has encountered with the definition of “employer” within the Act.
- Subject to appropriation, it gives the Department the ability to create an administrative process to help potentially process claims in an expedited manner.

- Creates an administrative fee of \$250 payable to the Department if the employer is found in violation of the Act.
- Passed the Senate with a vote of 56-0.
- Upon appropriation, creates a dedicated fund (that is not GRF) for the Department to utilize to enforce the Act.

HB 3665 – Health Workplace Act

- Provides up to seven sick days to all employees in Illinois annually.
- They also have the right and ability to earn the seven sick days within a 12-month period.
- They can use the sick days for any of the reasons stipulated in the Act.
- Department of Labor would be required to enforce the Act.
- This legislative session this bill appears to be dead, however, it was brought up to the Board as an FYI.

HB 5154 – Personnel Records Review Act

- Prohibits disclosure of performance evaluations under the Freedom of Information Act (FOIA).
- Passed the House with a vote of 70-39. Currently in the Senate.

HB5247 – Day and Temporary Labor Services Act

- Provides that when a third party client fails to pay the day labor agency or temp agency, that agency can file a complaint with the Department for collection.
- Passed the House with a vote of 110-0.

HB 6014 – Child Labor Law

- This is a Department initiative. Amends the law to reflect that children that come in from out of state would not have to be seen in person by the superintendent of schools for their employment certificate.
- Allows the Department to work with the State Board of Education or a superintendent so the child and/or parent would not have to come into the state just for the certificate.
- Passed the House with a vote of 114-0.

HB 6112 – Prevailing Wage Act

- Amends the Act to cover the transportation of aggregate materials that is used to build a public work site.
- Provides that the Department should take into consideration not only the applicable prevailing wage rate for those transporters of aggregate materials but also the Department of Transportation's method of establishing equipment rates for a truck.
- There is some controversy with this Act in regards to Davis-Bacon and its applicability.
- Currently, the Department has not taken a position on this bill.
- Passed the House with a vote of 71-43. Currently in the Senate.

HB 6349 – Employment of Illinois Workers on Public Works Projects (Preference Act)

- There are two Preference Acts in Illinois – the first Preference Act was declared unconstitutional.
- Department decided not to enforce the second Preference Act because legal and legislative research demonstrated concerns relating to the commerce, due process, equal protection and privileges and immunities clause.
- HB 6349 amends the second Preference Act to address some of the concerns with the Act. It amends the commerce and due process clause. It amends the due process clause by providing the right to review if someone is found in violation of the act. It amends the commerce clause by making it apply only to projects that are financed through the state or through funds administered by the state
- Penalties were changed from a civil penalty to a criminal penalty.
- Provides for a private right of action. This is an avenue that individuals would have because the equal protection and the privileges and immunities clause still need to be addressed in this legislation.

- Currently, a study is being conducted by Professor Bob Bruno from the University of Illinois in Chicago to gather data that would address the two issues stated above.
- This legislation also repeals the first Preference Act due to its unconstitutionality.
- Passed the House with a vote of 107-5. Currently in the Senate Labor Committee.

SB3571 – Employee Classification Act

- This bill would exempt owner/operator truck drivers from the Employee Classification Act.
- Doesn't look like this bill will pass this legislative session.

SB3588 – Personnel Records Review Act

- States that if any disciplinary record, letter or reprimand is released under FOIA, notification to the employee electronically or via any other method has to be given.
- Passed the Senate 44-0. Currently in the House State Government Committee.

SB3644 – Wage Payment and Collection Act

- This legislation applies to commission claims. If an employer fails to pay their employee their earned commission, they would have to pay said employee three times the amount owed; as well as attorney fees and costs.
- Passed the Senate 55-0. Currently in the House Labor Committee.

Update on Department's Administrative Rules

- The two proposed rulemakings for the capital bill (State Construction and Female Building Trades Act and the Use of Illinois Resident Labor) have a hearing scheduled for May 11th.
- The Safety Inspection and Education division rulemakings were both adopted and published on the April 2nd Illinois Register.
- Equal Pay Act proposed rules will be submitted to JCAR in the coming weeks.

Update on State Construction and Female Building Trades Act

- Requires all construction apprenticeship programs (registered or not) to report annually to the Department demographic data on all its apprentices, including race, gender, ethnicity and national origin.
- Department is required to publish a report by March 1st of each year demonstrating a compilation of the gathered data.
- Department contacted the US Department of Labor for a listing of all registered apprenticeship programs. The listing showed 212 registered apprenticeship programs in Illinois. The Department mailed letters to all 212 registered programs. In response to the outreach, 182 forms were returned from apprenticeship programs representing nearly 17,000 apprentices.
- Department contacted a variety of business and contractor organizations to see if they could provide guidance as to how to find unregistered apprenticeship programs. Unfortunately the Department could not find a way to find unregistered apprenticeship programs.
- A copy of the apprenticeship report is on the Department's website.

Legal Division:

Chief Legal Counsel, Michael Haggerty reported on the following:

Employee Classification Act (ECA) – Bartlow, Rhonda, et al versus Shannon

- Contractor that is under investigation filed suit in Franklin County circuit court alleging that the ECA is unconstitutional; specifically that it violates due process and equal protection clause and also constitutes special legislation.
- Contractor is asking the circuit court to enjoin the Department from enforcing ECA and for a temporary restraining order against the Department.

- Attorney General's office represented Director Catherine Shannon and Attorney General Lisa Madigan (the two defendants) in circuit court and the temporary restraining order was denied.
- Contractor then appealed to the Fifth District appellate court requesting they review the circuit court decision on not issuing a temporary restraining order.
- Appellate Court reversed the circuit court order and requested that a hearing be set on the issue of injunctive relief.
- Department and Attorney General's office filed a petition asking the Fifth District appellate court to reconsider its decision and that petition was denied.
- Currently, the Department and the Attorney General's office are reviewing what the next step(s) should be.

Department of Labor versus Sackville Construction

- In November 2008 a trial judge in Rock Island county ruled that as a matter of equity he was not going to require that the contractor pay prevailing wages to workers on the project because Sackville (subcontractor) had not received notice from the public body that the project was subject to the Act.
- Department's position on the issue was that if the court were to find, as a matter of equity, they were not going to require the contractor to pay penalties, the contractor should at least pay the prevailing wage itself.
- Department appealed the decision of the trial court to the appellate court. The audio tape of the proceeding should be available in a few days for review. Mike Haggerty will email the link to the audio to Carmela Gonzalez and she will email the LAB members the link so they can listen to the recording.
- Director Shannon pointed out that this was a very important for the enforcement of the Prevailing Wage Act. If the fact that the subcontractor did not receive notice means that they are not obligated to pay prevailing wage, it could have considerable implications in the future.
- There has been an amendment to the Prevailing Wage Act (effective January 1, 2010) in which it states that if the public body contracts with an individual and it doesn't give notice that the job is a prevailing wage project, then the public body becomes responsible for any penalties or interest. It doesn't relieve you of the obligation to pay prevailing wage. The same issue of responsibility would hold true if the high tier contractor would not give notice to the subcontractor.

McKinley Foundation (update)

- McKinley Foundation built a residence hall near (but not on the campus of the University of Illinois) with the Illinois Finance Authority issuing \$22 million in bonds to assist.
- Department's position is that Section 2 of the Act makes it clear that public works include all projects financed through bonds issued under the Illinois Finance Authority Act.
- The McKinley Foundation filed suit seeking declaratory judgment that the project was not subject to the Prevailing Wage Act, because although it is a public work by definition, it has no prior history of public funding and therefore they are not a public body.
- The Foundation's argument is that it's a two pronged test that the Department uses in order to be subject to the Act – one, the project would have to be both a public body and two, the fixed work would have to be a public work.
- Department's position is that regardless of the two prong test, the Foundation has conceded that it was a public work by definition so prevailing wage needs to be paid on this particular project.

Midway Games (update)

- In February 2009, Midway Games filed for Chapter 11 bankruptcy and 15 former employees filed wage claim complaints with the Department claiming they were owed paid time off (vacation pay).
- Department conducted an investigation and upon knowledge of the bankruptcy filing, the Department ceased enforcement efforts to collect the monies owed from the entity.

- However, Department continued its collection efforts against the officers or other agents as stipulated under the Act. Department found two individuals to send the wage payment demand to and when they didn't pay within the allotted time, the matter was referred to the Attorney General's office.
- Consequently, a three-count complaint was filed in the bankruptcy court in Delaware against Director Shannon. One, for declaratory and injunction relief to seek to relieve the officers for paying the wage demand(s). Two, that the automatic stay that applied to the entity, be also applied to its officers and third, that the Department be enjoined from seeking to enforce the law against them in an Illinois court and that the Department be required to litigate whether or not they are Illinois employers and liable under the Illinois Wage Payment and Collection Act in Delaware.
- Two attorneys from the Attorney General's Office were sent to Delaware to argue on the Department's motion to dismiss.
- On March 25th the court denied a part of the Department's motion and the other part was deferred. So the bankruptcy court has basically punted hoping that the bankruptcy plan that is currently being written may satisfy all parties.
- At this point, the Department in consultation with the AG's office is considering its next action.
- Director Catherine Shannon and Mike Haggerty also pointed out that this was a recurring problem due to the economic times that workers are facing and they are left with wages being owed to them and the Department in many instances cannot collect from the entity and has bigger obstacles going after the officers or individuals. A possible solution may be to change some of the laws to better assist workers.

Conciliation and Mediation Division:

Division Manager, Tom Whalen reported on the following:

Quarterly Update Highlights

- The Conciliation and Mediation division has issued 41 first notice of violation for this quarter, however, for the current fiscal year (July – February) it has issued 115 first notice of violation.
- The Conciliation and Mediation division has issued no second notice of violation for this quarter, however, for the current fiscal year (July – February) it has issued 2 second notice of violation.
- The Conciliation and Mediation division has had no debarments this fiscal year.
- The Conciliation and Mediation division has had a total of 239 complaints filed for this quarter, however, for the current fiscal year (July – February) a total of 795 complaints were filed.
- The Conciliation and Mediation division has assigned 9 arbitrations this quarter, however, for the current fiscal year there has been 18.
- The Conciliation and Mediation division has received 10 Employee Classification complaints for this quarter and for the fiscal year there has been 53 complaints filed.
 - In the course of several ECA investigations, \$621,000 in penalties has been assessed. It is important to note that we have not collected that amount but have assessed and if collected it would go into the Employee Classification Fund for the Department to use for enforcement of ECA. Of that amount, we have been able to collect \$10,000. All other cases were referred to the Attorney General for collection enforcement.
- The Conciliation and Mediation division has received 28 WARN notices and there has been 6 new complaints filed.

- For the current fiscal year, the Division has collected 1.2 million in prevailing wages and between 250,000 – 300,000 dollars in penalties. It is important to note that these penalties go directly into the general revenue fund, not the Department.

Fair Labor Standards Division (FLS):

Division Manager, Suzanne Davis reported on the following:

- Day and Temporary Labor Service agencies renewals: 230 applications with 711 locations. There is a 9% decrease this year but due to the economy a lot of business might have gone under and filed for bankruptcy or assignment for benefit of the creditor. Compliance officers are ensuring that all agencies that have not registered are non-operational.
- Wage Payment and Collection Act: For this fiscal year, the Fair Labor Standards division has collected over 1.2 million. That is an 18% increase from last year. In 2009, the Department collected over 1.3 million.
- FLS has had an increase in multiple wage claims. Multiples are wage claims filed against the same company for wages, vacation time and/or bonuses. FLS and Legal work together to ensure that they go through the investigative process at the same time and in the case of bankruptcy, that these cases (if applicable) hold the officer of the company liable.
- Minimum Wage/Overtime Law: For this fiscal year, the FLS division has collected 1.5 million. When they are referred to the AG's office there are situations in which the Department and the employer end up in a settlement agreement if the amount owed is significant. Employer can pay over a couple of months and the employee receives the money he is due.
- Child Labor Law: FLS has reviewed over 13,000 certificates and has cited 180 violations and has collected \$9920 in penalties on 41 cases.

Equal Opportunity Workforce Division (EOWD):

Division Manager, Doris Moy reported on the following:

Equal Pay Act Quarterly Update:

- For this quarter, the EOWD (with the assistance of the AG's office) collected over \$14,000 for six employees who formally worked for a fast food restaurant in Jefferson County.
- Case number EP323 is still pending since the last Board meeting. The division found that an employee in Cook County was owed over \$9000. The respondents requested an informal conference after the decision was relayed. The request for an informal conference is spearheaded by the Department's Chief Administrative Law Judge (CALJ).
 - The CALJ at first denied the request for hearing and the respondents requested a review of her first denial. The CALJ granted the respondent the opportunity to re-file its request by March 1st. The second request was granted because the respondents cited factors other than gender or sex for explaining the difference in pay for the male assistant managers versus the female. Respondent cited circuit case law arguing that the Equal Pay Act asks whether an employee has a reason other than sex, not whether it has a good reason. The Respondents position was that they do have several factors other than gender which include prior salary history and prior management level experience from the males versus the female employee to name a few. The CALJ is currently doing her own review on case law to make her determination.
 - The Department's position is that while the Respondent might possess several factors other than gender in order to prevail with their case law they failed to mention that the Seventh Circuit court also asks whether these factors other than gender are discriminatorily applied or whether they cause a discriminatory effect. In the Department's opinion that is a key question. The court has also asked if the factor other than gender is bona fide and applied in good faith.

- Case number EP356 – complaint involved a female formerly employed at a manufacturing company in Winnebago County. Respondent claimed there were no males performing the same work as the females. An investigator went out to the company and observed the work being performed. She found there were males performing the same duties and that the female wasn't given the males job title and was performing the same duties. EOWD found a violation had occurred and the respondent has since then settled the matter and the complainant should have received \$5000 in back wages.
- Case number EP361 – complaint involved a female cook who was performing the same work as a male cook. The respondent had alleged that the male cook was in a supervisory role and therefore that was why he was being paid more. In the course of the investigation it was found that the statement made was incorrect – there was a supervisor overseeing the cooks. EOWD found that the complainant was owed \$11,350. To date the respondent has not paid the amount owed and the Department has forwarded the case to the AG's for the case to be filed in circuit court.
- Case number EP388 – this complaint involves an assistant manager who was paid less than her predecessor and her successor and they were both males. All three individuals were performing the same duties. EOWD investigated and found that the female assistant manger was owed \$6786 in back wages and \$750 in civil penalties.

VESSA Quarterly Update:

- EOWD plans to send out advisory notices on VESSA. The goal is to mail out the notice to 50,000 employers in the State. Currently, 6000 notices are being sent out on a monthly basis. Generally, the Department has no monetary resources to mail out such a huge number of notices, however, the Department was able to secure grant money (not from the General Fund) to utilize for this purpose. Due to the mailings, a significant number of employers have called with inquiries on the law and requesting additional posters to be mailed out.

Public Safety Update:

Chicago Enforcement Manager, John Bastert reported on the following:

- No update could be given for the Southern region of the State in regards to inspections for the division. Division Manager has been out to a critical health incident. Computers used by the division require an "index finger" identification to log in and there is no other way of logging in.
- For the Northern region of the State there were two fatalities to report and investigate (Homewood Fire Department and the Chicago Police Department).
 - The Homewood Fire Department involved a firefighter in regards to a search and rescue operation in which two elderly gentlemen who required oxygen (and had some in their home) were the victims in this case. NIOSH is also helping with the investigation; as well as the Illinois State Fire Marshall's Office. This will be a lengthy investigation and it will be some time before official findings are presented.
 - The Chicago Police Department involved a sergeant who responded to a call travelling south on Lake Shore Drive and lost control of his car. No witnesses were there and he was the lone occupant in the vehicle. He backed into a light pole that whiplashed the car around and he smacked a tree on the driver's side. Unfortunately, he never recuperated from his internal injuries.
- In regards to the OSHA State Plan, the Department held a press conference on March 24th. It received good media coverage and it was well attended. There is a link on the Department's website that highlights key parts of the conference for review. Additionally, the Division Manager, Chicago Enforcement

Manager, State Plan Coordinator and four new safety inspectors have been hired in that division. One thing to note, while four safety inspectors have been hired they are currently in the training process and they're not going to be fully operational until they receive the adequate training. There are still an additional four positions that need to be hired and that will be done in 2011.

- Director Shannon reiterated her thanks for the support and assistance from everyone who attended the Board meeting for obtaining this additional money and will continue to receive. It will not only gives us more staff but will make the Department's program more consistent, more professional, and help us keep people safe in the workplace.
- The Department in the next several months will be presenting a number of safety and health meetings in the Fall. Currently, coordination of these presentations is underway and as soon as the dates and locations are confirmed promotion of the events will begin. These sessions are to ensure that public sector employers as well as union representatives and their employees are aware of what the state plan means for them and how it can help them.

Next Meeting Date:

Director Shannon ended the meeting by asking members for their availability for the next Board meeting. It was decided that Carmela Gonzalez would send potential dates for November to all members and coordinate schedules accordingly.

Meeting Adjourned:

Director Catherine Shannon adjourned the meeting at 3:34 p.m.